

NO. PD-0048-20

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS
AUSTIN, TEXAS

FILED
COURT OF CRIMINAL APPEALS
3/11/2020
DEANA WILLIAMSON, CLERK

DAVID ASA VILLARREAL,
Appellant,
vs.

THE STATE OF TEXAS,
Appellee.

APPELLANT'S PETITION FOR DISCRETIONARY REVIEW
TO THE FOURTH COURT OF APPEALS DISTRICT
SAN ANTONIO, TEXAS
CAUSE NUMBER 04-18-00484-CR

APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

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TABLE OF CONTENTS

	PAGE
TABLE OF INTERESTED PARTIES.....	iv
APPELLANT’S PETITION FOR DISCRETIONARY REVIEW.....	v
TABLE OF AUTHORITIES.....	vi
STATEMENT REGARDING ORAL ARGUMENT.....	vii
AUTHORITIES IN SUPPORT OF APPELLANT’S PETITION FOR DCRETIONARY REVIEW.....	1
NATURE OF THE CASE.....	1
PROCEDURAL HISTORY OF THE CASE.....	2
REASONS FOR REVIEW.....	3
GROUND FOR REVIEW.....	5
ARGUMENT AND AUTHORITIES IN SUPPORT OF THE GROUND FOR REVIEW.....	5
CERTIFICATE OF SERVICE AND CONCLUSION AND PRAYER.....	11,12

CERTIFICATE OF COMPLIANCE.....	13
--------------------------------	----

APPENDIX.....	14
---------------	----

TABLE OF INTERESTED PARTIES

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TRIAL JUDGE:

JEFFERSON MOORE
186th Judicial District Court
Bexar County, Texas

DAVID ASA VILLARREAL,	§	IN THE COURT OF
Appellant,	§	
vs.	§	CRIMINAL APPEALS
	§	
THE STATE OF TEXAS,	§	AUSTIN, TEXAS
Appellee.	§	

PETITION FOR DISCRETIONARY REVIEW OF CAUSE NUMBER
04-18-00454-CR IN THE COURT OF APPEALS FOR
THE FOURTH COURT OF APPEALS DISTRICT OF TEXAS
SAN ANTONIO, TEXAS

APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

Now comes, Edward F. Shaughnessy, III, Attorney-at-Law, on behalf of the appellant, David Asa Villarreal, and prays that a Petition for Discretionary Review be granted to the appellant in the above styled and numbered cause. The arguments in support of that request are provided hereinafter and are incorporated by reference.

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TABLE OF AUTHORITIES

UNITED STATES CASES	PAGE
<i>Geders v. United States</i> , 425 U.S. 80 (1976).....	7
<i>Perry v. Leeke</i> , 488 U.S. 272 (1989).....	7
FEDERAL CASES	
<i>United States v. Cavallo</i> , 790 F.3d 1202 (2015).....	9
<i>United States v. Johnson</i> , 267 F.3d 376 (2001).....	9
STATE CASE	
<i>Villarreal v. State</i> , __ S.W.3d __ (No. 04-18-00484-CR, Tex. App.- San Antonio, December 19, 2019, 2019 WL 7196614).....	2

STATEMENT REGARDING ORAL ARGUMENT

Counsel for the appellant would submit that in the event that this petition is granted, oral argument would be warranted inasmuch as the issue to be resolved by this Court is novel and worthy of oral argument on the issue presented.

DAVID ASA VILLARREAL,	§	IN THE COURT OF
Appellant,	§	
vs.	§	CRIMINAL APPEALS
THE STATE OF TEXAS,	§	AUSTIN, TEXAS
Appellee		

ARGUMENTS AND AUTHORITIES IN SUPPORT
OF THE APPELLANT’S PETITION FOR DISCRETIONARY REVIEW
OF CAUSE NUMBER 04-18-00484-CR

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

NOW COMES, David Asa Villarreal, appellant in the lower Court, by and through, Edward F. Shaughnessy, III, attorney at law, and offers the following arguments and authorities in support of his request that this Court grant his request for a Petition for Discretionary Review in the instant case, cause number PD-0048-20.

NATURE OF THE CASE

The appellee, Juan Martinez, Jr., was indicted by a Bexar County Grand Jury for the offense of Murder in Cause Number 2016-CR-0549. (C.R.-4) The trial proceeded before a jury on the appellant’s plea of not guilty. The jury returned a verdict of guilty and thereafter assessed the appellant’s punishment at sixty years of confinement in the Institutional

Division of the Texas Department of Criminal Justice. (C.R.-194) Timely notice of appeal was filed and an appeal to the Fourth Court of Appeals ensued.

PROCEDURAL HISTORY OF THE CASE IN THE LOWER COURT

On December 27, 2019, the San Antonio Court of Appeals, in a published opinion, authored by Chief Justice Marion, affirmed the judgment of the trial court in all respects. *Villarreal v. State*, (No. 04-18-00484-CR, Tex. App.-San Antonio, December 27, 2019, 2019 WL 7196614) (Appendix) Justice Martinez authored a dissenting opinion. This Court has granted the appellant's request for extension of time to file the instant petition until March 23, 2020.

The Appellant would submit that there exists one ground for review that warrants review by this Court. It is urged by the Appellant that there exist, at a minimum, three distinct reasons for reviewing the action of the Court of Appeals for the Fourth Court of Appeals District.

REASONS FOR REVIEW

A

The appellant respectfully petitions this Honorable Court to grant this Petition for Discretionary Review pursuant to *Rule 66.3 (b), Tex. R. App. Proc.* which states that one of the non-exclusive reasons for this Court to grant a petition for discretionary review is that the Court of Appeals has decided an important question of state or federal law that has not been, but should be, settled by the Court of Criminal Appeals. The appellant would respectfully submit that the opinion of the Fourth Court of Appeals has decided an important question of state or federal law that has not been, but should, settled by this Court.

B

The appellant respectfully petitions this Honorable Court to grant this Petition for Discretionary Review pursuant to *Rule 66.3(c), Tex. R. App. Proc.* which states that, one of the non-exclusive reasons for this Court to grant a discretionary review, is that the Court of Appeals has decided an important question of federal law in a way that conflicts with the applicable decisions of the Supreme Court of the United States. The appellant would

respectfully submit that the Court of Appeals has decided an important question of federal law that conflicts with an applicable decision of the Supreme Court of the United States.

C

The appellant respectfully petitions this Honorable Court to grant this Petition for Discretionary Review pursuant to *Rule 66.3(e), Tex. R. App. Proc.* which states that, one of the non-exclusive reasons for this Court to grant a discretionary review, is that the justices of a court of appeals have disagreed on a material question of law necessary to the court's decision. The appellant would respectfully submit that the justices of the Fourth Court of Appeals have disagreed on a material question of law necessary to the court's decision.

GROUND FOR REVIEW

THE COURT OF APPEALS ERRED IN HOLDING THAT
THE TRIAL COURT PROPERLY LIMITED THE APPELLANT'S
ABILITY TO CONSULT WITH TRIAL COUNSEL DURING AN
OVERNIGHT RECESS IN VIOLATION OF THE APPELLANT'S
SIXTH AMENDMENT RIGHT TO COUNSEL

ARGUMENT AND AUTHORITIES IN SUPPORT OF THE GROUND FOR REVIEW

STATEMENT OF APPLICABLE FACTS

The facts pertinent to the ruling of the trial court are fairly straightforward and relate to a fairly short incident that occurred during the guilt phase of the appellant's trial. The appellant took the stand in the presence of the jury. His testimony had not been concluded at the end of the day's court session. At that point in the proceedings the following exchange unfolded:

THE COURT: . . . Mr. Villarreal, we're in an unusual situation. You are right in the middle of testimony. Normally your lawyer couldn't come up and confer with you about your testimony in the middle of having the jury hear your testimony. And so I'd like to tell you that you can't confer with your attorney but the same time you have a Fifth Amendment [*sic*] right to talk to your attorney.

So I'm really going to put the burden on [trial counsel] to tell you the truth. . . . I'm going to ask that both of you [trial counsel] pretend that Mr. Villarreal is on the stand. You couldn't confer with him during that time.

Now, Mr. Villarreal, if—puts us in an odd situation. But I believe if you need to talk to your attorneys, I'm not telling you, you can't talk to them. But I'm going to rely on both [trial counsel] to use your best judgment in talking to the defendant because you can't—you couldn't confer with him while he was on the stand about his testimony. So I'm going to leave it to both of your good judgment of how you manage that, if for some reason he believes he needs to confer.

[TRIAL COUNSEL 1]: All right. So just so I am clear and don't violate any court orders, that—because he is still on direct and still testifying, that it is your ruling that we cannot confer with our client?

THE COURT: Let me help you with that. For instance, suppose we go into a sentencing hearing and you need to start talking to him about possible sentencing issues, you can do that. Does that make sense? I don't want you discussing what you couldn't discuss with him if he was on the stand in front of the Jury.

[TRIAL COUNSEL 1]: Okay.

THE COURT: His testimony. I'm not sure whatever else you'd like to talk with him about while he's on the stand. But ask yourselves before you talk to him about something, is this something that—manage his testimony in front of the jury? Does that make sense to you?

[TRIAL COUNSEL 1]: Sure, it does. -4-

[TRIAL COUNSEL 2]: We aren't going to talk to him about the facts that he testified about.

THE COURT: All right. Fair enough. But at the same time—I'm going to put the burden on the lawyers, not on him, because he has a constitutional right to confer with you. . . .

[TRIAL COUNSEL 1]: Okay. All right. I understand the Court's judgment and just—just for in the future, I'm just going to make an objection under the Sixth Amendment that the Court's order infringes on our right to confer with our client without his defense.

THE COURT: Objection noted. (R.R.6-138)

In his second point of error on direct appeal to the Fourth Court of Appeals the appellant asserted that the action of the trial Court violated the appellant's Sixth

Amendment right to counsel by impermissibly restricting his right to consult with counsel during the course of the trial.

The Court below rejected the appellant's allegation of error and affirmed the judgment of the lower Court. It held as follows:

In the absence of any guidance from the court of criminal appeals or any of our sister courts in Texas, and based on the Supreme Court's decisions in *Geders*¹ and *Perry*, we hold the trial court had discretion to limit Villarreal's right to confer with his attorneys during an overnight recess to topics other than his ongoing testimony. Both *Geders* and *Perry*² acknowledge that, "when a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying." *Perry*, 488 U.S. at 281; *see also Geders*, 425 U.S. at 88. Although *Geders* instructs that the trial court had no discretion to prohibit Villarreal and his attorneys from discussing "anything," it did not do so. Rather, the trial court expressly recognized Villarreal's constitutional right to confer with his counsel and put the onus on counsel to ensure any discussions avoided the topic of Villarreal's testimony. Villarreal's attorneys repeatedly confirmed they understood the trial court's order. Accordingly, in this matter of first impression in Texas, we conclude the trial court did not abuse its discretion in limiting Villarreal's right to confer with his counsel during an overnight recess to matters other than his ongoing trial testimony. Villarreal's second issue is overruled.

¹ *Geders v. United States*, 452 U.S. 80 (1976).

² *Perry v. Leeke*, 488 U.S. 272 (1989).

A

As noted above, the appellant has asserted that the opinion of the Court of Appeals warrants review, by this court, because it has decided an important question of state or federal law that has not been, but should be settled, by the Court of Criminal Appeals

As noted by the majority opinion of Chief Justice Marion the issue raised by the appellant was one which lacked “guidance from the court of criminal appeals or any of our sister courts in Texas” on the question presented in the appellant’s point of error. Put in other words, the court below decided an important question of state or federal law that has not been settled by this Court. The lower Court specifically labeled the issue raised by the appellant as one of “first impression in Texas”. The appellant concurs with that assessment, and would submit that matters of “first impression” of constitutional dimension should be settled by this Court so as to serve as appropriate guidance to the trial courts of this state.

B

In its second reason for review the appellant urges that the instant case is worthy of review on the grounds that the opinion of the Court below decided an important question of federal law in conflict with the applicable decision of the holding of the United States Supreme Court on the issue presented.

In *Geders v. United States*, *supra*, the Supreme Court of the United States held that, in restricting a defendant's access to counsel in a manner endorsed by the Court below, a trial Court violates a defendant's right to access to counsel during the course of a trial, thereby violating the defendant's right to counsel as guaranteed by the Sixth Amendment to the United States Constitution. The Court below found the instant case factually distinguishable from the scenario presented in *Geders*. The appellant would submit that the factual distinctions, drawn by the lower Court, are not sufficient to warrant a finding that the Sixth Amendment rights of the defendant were adequately protected during the course of the trial. See: *United States v. Carrillo*, 790 F.3d 1202 (11th Cir. 2015); *United States v. Johnson*, 267 F.3d 376 (5th Cir. 2001).

The holding of the majority warrants review by this Court because it wholly fails to comport with the applicable holding of the Supreme Court of the United States.

C

In his third and final reason for review, the appellant urges that the opinion and holding of the Court below warrant review by this Court because the justices of that Court disagreed on a material question of law necessary to the decision reached by that Court.

As noted above, Justice Martinez authored an extensive dissenting opinion in the instant case. In her view the majority applied the “wrong standard of review” in analyzing the appellant’s claim of a violation of his rights as guaranteed by the Sixth Amendment to the United States Constitution. Certainly a disagreement over the proper standard of review, to apply in analyzing a claim of a constitutional violation, constitutes a disagreement on a material question of law necessary to the decision reached by the Court below. For that reason a review by this Court is warranted.

CONCLUSION AND PRAYER

It is respectfully requested, by the appellant that a petition for discretionary review to the Fourth Court of Appeals be granted and that the case be briefed on the merits of the appellant's ground for review with argument to follow.

Respectfully submitted,

_____/s/ _____

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Attorney for the appellant

CERTIFICATE OF SERVICE

I, Edward F. Shaughnessy, III., certify that a copy of the foregoing petition was mailed to Andrew Warthen, attorney for the appellee, 101 W. Nueva , San Antonio, Texas 78205, on this the __11th__ day of March, 2020.

_____/s/_____

Edward F. Shaughnessy, III

CERTIFICATE OF SERVICE

I, Edward F. Shaughnessy, III certify that a copy of the foregoing petition was mailed to Stacy Soule, State Prosecuting Attorney, P.O. Box 78711, Austin, Texas 78711, on this the __11th__ day of March, 2020.

_____/s/_____

Edward F. Shaughnessy, III

CERTIFICATE OF COMPLIANCE

I, Edward F. Shaughnessy, III certify that the instant document contains 2,680 words (excluding the appendix).

_____/s/_____

Edward F. Shaughnessy, III

APPENDIX

Fourth Court of Appeals San Antonio, Texas

OPINION

No. 04-18-00484-CR

David Asa **VILLARREAL**, Appellant

v.

The **STATE** of Texas, Appellee

From the 186th Judicial District Court, Bexar County, Texas Trial Court No. 2016CR0549
Honorable Jefferson Moore, Judge Presiding

Opinion by:

Dissenting Opinion by: Rebeca C. Martinez, Justice

Sandee Bryan Marion, Chief Justice

Sitting: Sandee Bryan Marion, Chief Justice Rebeca C. Martinez, Justice

Luz Elena D. Chapa, Justice Delivered and Filed: December 27, 2019

AFFIRMED

A jury convicted appellant David Asa Villarreal (“Villarreal”) of murder with a repeat offender enhancement and sentenced him to confinement for sixty years. In two issues on appeal, Villarreal argues the trial court erred by admitting hearsay testimony and by limiting his ability to confer with counsel during an overnight recess in violation of his Sixth Amendment right to counsel. We affirm the trial court’s judgment.

Admission of Evidence

In his first issue, Villarreal argues the trial court erred by admitting, over his hearsay objection, testimony regarding the contents of a text message sent on the night of the murder by

the victim to Veronica Hernandez, a mutual friend of Villarreal and the victim. During Hernandez's direct examination, the following exchange occurred:

Q. [by the prosecutor] So when [Villarreal and the victim] got back, what happened after that?

A. [by Hernandez] [The victim] sent me a text and he said—

[DEFENSE COUNSEL]: Objection, hearsay, Your Honor. And lack of foundation, especially when it comes to cell phones and spoofing and phone numbers and who actually sent from what phone. I don't think the proper foundation has been laid for her to know exactly who sent what message.

THE COURT: It's overruled. Go ahead.

Q. [by the prosecutor] Being that you hung out with [the victim] a lot, were you familiar with his phone number?

A. [by Hernandez] Yes, ma'am.

Q. Did you have it programmed in your telephone[?]

A. Yes, ma'am.

Q. Did you text [the victim] a lot?

A. I did.

... .

Q. Okay. And it was common for you guys to have conversations over text messages?

A. Yes, ma'am.

Q. Okay. So that night, did you end up spending the night? A. No, ma'am.

A. He told me—[the victim] told me that [Villarreal] wanted to work things out, and he was trying to make peace with [Villarreal]. That was—

Q. Were they having problems in their relationship?

A. I guess so.

[DEFENSE COUNSEL]: Objection then to the speculation. THE COURT: Overruled. Go ahead.

As a prerequisite to presenting a complaint for appellate review, the record must show the complaint was made to the trial court by timely objection. TEX. R. APP. P. 33.1(a)(1). Where the complaint raised on appeal does not comport with the trial objection, nothing is preserved for our review. *Clark v. State*, 365 S.W.3d 333, 339 (Tex. Crim. App. 2012); *Huerta v. State*, 933 S.W.2d 648, 650 (Tex. App.—San Antonio 1996, no pet.). “In addition, a party must object each time the inadmissible evidence is offered or obtain a running objection.” *Valle v. State*, 109 S.W.3d 500, 509 (Tex. Crim. App. 2003). “An error in the admission of evidence is cured where the same evidence comes in elsewhere without objection.” *Id.*

Here, although the trial court overruled Villarreal’s initial hearsay objection, Hernandez did not immediately testify regarding the contents of the victim’s text message. Rather, after answering several additional questions regarding her familiarity with the victim’s telephone number and the frequency of her communications with the victim, Hernandez eventually relayed the contents of the victim’s text message in response to a different question. Villarreal objected to Hernandez’s response to the latter question on the basis of speculation but not hearsay. Accordingly, because Villarreal failed to obtain a ruling on a running objection or to re-urge his objection to the testimony on the basis of hearsay, his hearsay complaint is not preserved. Villarreal’s first issue is overruled.

Sixth Amendment

In his second issue, Villarreal argues the trial court erred by limiting his ability to confer with his counsel during an overnight recess in violation of his Sixth Amendment right to counsel. Specifically, Villarreal complains of the following exchange between the trial court and Villarreal's counsel, which took place during Villarreal's direct examination and prior to an overnight recess:

THE COURT: . . . Mr. Villarreal, we're in an unusual situation. You are right in the middle of testimony. Normally your lawyer couldn't come up and confer with you about your testimony in the middle of having the jury hear your testimony. And so I'd like to tell you that you can't confer with your attorney but the same time you have a Fifth Amendment [*sic*] right to talk to your attorney.

So I'm really going to put the burden on [trial counsel] to tell you the truth. . . . I'm going to ask that both of you [trial counsel] pretend that Mr. Villarreal is on the stand. You couldn't confer with him during that time.

Now, Mr. Villarreal, if—puts us in an odd situation. But I believe if you need to talk to your attorneys, I'm not telling you, you can't talk to them. But I'm going to rely on both [trial counsel] to use your best judgment in talking to the defendant because you can't—you couldn't confer with him while he was on the stand about his testimony. So I'm going to leave it to both of your good judgment of how you manage that, if for some reason he believes he needs to confer.

[TRIAL COUNSEL 1]: All right. So just so I am clear and don't violate any court orders, that—because he is still on direct and still testifying, that it is your ruling that we cannot confer with our client?

THE COURT: Let me help you with that. For instance, suppose we go into a sentencing hearing and you need to start talking to him about possible sentencing issues, you can do that. Does that make sense? I don't want you discussing what you couldn't discuss with him if he was on the stand in front of the Jury.

[TRIAL COUNSEL 1]: Okay.

THE COURT: His testimony. I'm not sure whatever else you'd like to talk with him about while he's on the stand. But ask yourselves before you talk to him about something, is this something that—manage his testimony in front of the jury? Does that make sense to you?

[TRIAL COUNSEL 1]: Sure, it does. -4-

[TRIAL COUNSEL 2]: We aren't going to talk to him about the facts that he testified about.

THE COURT: All right. Fair enough. But at the same time—I’m going to put the burden on the lawyers, not on him, because he has a constitutional right to confer with you. . . .

[TRIAL COUNSEL 1]: Okay. All right. I understand the Court’s judgment and just—just for in the future, I’m just going to make an objection under the Sixth Amendment that the Court’s order infringes on our right to confer with our client without his defense.

THE COURT: Objection noted.

The Sixth Amendment guarantees criminal defendants the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). In reviewing a complaint that the trial court deprived a defendant of counsel during a portion of the trial, we apply an abuse of discretion standard. *Burks v. State*, 227 S.W.3d 138, 144 (Tex. App.—Houston [1st Dist.] 2006, pet. ref’d) (citing *Perry v. Leeke*, 488 U.S. 272, 282 (1989); *Geders v. United States*, 425 U.S. 80, 86–91 (1976)).

Although the trial court has “broad power to sequester witnesses before, during, and after their testimony,” the Supreme Court has held this discretion is significantly limited by the Sixth Amendment when applied to a testifying defendant. *Geders*, 425 U.S. at 87–88. In *Geders*, the Supreme Court held the trial court abused its discretion by prohibiting the defendant from consulting his counsel “about anything” during an overnight recess between the defendant’s direct and cross-examinations. *Id.* at 88, 91.

However, not every restriction on a defendant’s ability to communicate with his counsel violates his Sixth Amendment right to counsel. In *Perry*, the Supreme Court held it was not an abuse of discretion to prohibit a defendant from conferring with his counsel during a fifteen-minute recess between the defendant’s direct and cross-examinations. 488 U.S. at 284–85. The Court reasoned that because a defendant “has no constitutional right to consult with his lawyer while he is testifying,” the trial judge must have the power to “maintain the status quo during a

brief recess in which there is a virtual certainty that any conversation between the witness and the lawyer would relate to the ongoing testimony.” *Id.* at 281, 283–84. Noting the “thin” line between the facts at issue in *Perry* and those at issue in *Geders*, the *Perry* Court distinguished the fifteen-minute recess from the overnight recess in *Geders*, explaining:

The interruption in *Geders* was of a different character because the normal consultation between attorney and client that occurs during an overnight recess would encompass matters that go beyond the content of the defendant’s own testimony—matters that the defendant does have a constitutional right to discuss with his lawyer, such as the availability of other witnesses, trial tactics, or even the possibility of negotiating a plea bargain. . . . The fact that such discussions will inevitably include some consideration of the defendant’s ongoing testimony does not compromise that basic right. *Id.* at 284.

The Supreme Court, therefore, has recognized the trial court may prevent a testifying defendant from discussing his ongoing testimony with his counsel but may not prohibit the defendant and his counsel from discussing matters “that go beyond the content of the defendant’s own testimony,” such as trial strategy. *See id.* In this case, the trial court tried to thread the needle by advising Villarreal that he could talk to his attorneys during the overnight recess but instructing Villarreal’s attorneys not to discuss “what you couldn’t discuss with [Villarreal] if he was on the stand in front of the jury. . . . His testimony.” The trial court asked counsel if his instructions “make sense to you,” and Villarreal’s two attorneys responded, respectively: “Sure, it does” and “We aren’t going to talk to him about the facts that he testified about.” Although one of Villarreal’s attorneys lodged a Sixth Amendment objection “just for in the future,” he reiterated: “I understand the Court’s judgment.”

In the years since the *Perry* decision, the Supreme Court has not squarely addressed the precise question here—*i.e.*, whether the trial court abuses its discretion by permitting the defendant

to consult his counsel during an overnight recess about any topic except his ongoing testimony. While the issue appears to be one of first impression in Texas, courts in other states and the federal circuit courts of appeals have addressed it and reached opposing conclusions.

Several state supreme courts have held that while the trial court may not prohibit all communications between a testifying defendant and his attorney during an overnight recess, it may prohibit communications specifically about the defendant's ongoing testimony. *E.g.*, *Beckham v. Commonwealth*, 248 S.W.3d 547, 553–54 (Ky. 2008); *State v. Conway*, 842 N.E.2d 996, 1021 (Ohio 2006); *Webb v. State*, 663 A.2d 452, 459–60 (Del. 1995) (holding trial court properly instructed testifying defendant “not to discuss [his] testimony with anyone” but erred by failing to make it “unmistakably clear” that the defendant and his counsel could discuss “other matters”). In contrast, several federal circuit courts of appeals have held any restriction on communication with counsel during an overnight recess is impermissible. *E.g.*, *United States v. Triumph Capital Grp., Inc.*, 487 F.3d 124, 132–33 (2d Cir. 2007); *United States v. Sandoval-Mendoza*, 472 F.3d 645, 651 (9th Cir. 2006); *United States v. Santos*, 201 F.3d 953, 965 (7th Cir. 2000); *United States v. Cobb*, 905 F.2d 784, 792 (4th Cir. 1990).

In the absence of any guidance from the court of criminal appeals or any of our sister courts in Texas, and based on the Supreme Court's decisions in *Geders* and *Perry*, we hold the trial court had discretion to limit Villarreal's right to confer with his attorneys during an overnight recess to topics other than his ongoing testimony. Both *Geders* and *Perry* acknowledge that “when a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying.” *Perry*, 488 U.S. at 281; *see also Geders*, 425 U.S. at 88. Although *Geders* instructs that the trial court had no discretion to prohibit Villarreal and his attorneys from

discussing “anything,” it did not do so. Rather, the trial court expressly recognized Villarreal’s constitutional right to confer with his counsel and put the onus on counsel to ensure any discussions avoided the t’s pic of Villarreal’s testimony. Villarreal’s attorneys repeatedly confirmed they understood the trial court’s order. Accordingly, in this matter of first impression in Texas, we conclude the trial court did no abuse its discretion in limiting Villarreal’s right to confer with counsel during an overnight recess to matters other than his ongoing trial testimony. Villarreal’s second issue is overruled.

Conclusion

Having overruled both of Villarreal’s issues, we affirm the trial court’s judgment. Sandee Bryan Marion, Chief Justice

PUBLISH

Fourth Court of Appeals San Antonio, Texas

DISSENTING OPINION

No. 04-18-00484-CR

David Asa **VILLARREAL**, Appellant

v.

The **STATE** of Texas, Appellee

From the 186th Judicial District Court, Bexar County, Texas Trial Court No. 2016CR0549
Honorable Jefferson Moore, Judge Presiding

Opinion by:

Dissenting Opinion by: Rebeca C. Martinez, Justice

Sandee Bryan Marion, Chief Justice

Sitting: Sandee Bryan Marion, Chief Justice Rebeca C. Martinez, Justice

Luz Elena D. Chapa, Justice Delivered and Filed: December 27, 2019

I believe the majority applies the wrong standard of review to Villarreal's Sixth
Amendment assistance of counsel claim. Because I believe the trial court's order effectively

denied Villarreal his Sixth Amendment right to assistance of counsel by prohibiting him from

1

conferring with his attorney during an overnight recess, I respectfully dissent.

Because I find Villarreal’s second issue dispositive, I do not address Villarreal’s first issue. *See* TEX. R. APP. P. 47.1.

Dissenting Opinion

04-18-00484-CR

RIGHT TO ASSISTANCE OF COUNSEL

Standard of Review and Applicable Law

Villarreal’s Sixth Amendment assistance of counsel claim should properly be reviewed under a *de novo* standard of review. “In approaching a Sixth Amendment right-to-counsel question, as with many other constitutional issues, . . . [a]n appellate court should afford ‘almost total deference’ to a trial court’s determination of the historical facts and to its determination of

mixed questions of law and fact that turn on an evaluation of credibility and demeanor. Mixed questions of law and fact that do not turn on credibility and demeanor are to be reviewed *de novo*.” See *Manns v. State*, 122 S.W.3d 171, 178 (Tex. Crim. App. 2003) (internal footnotes and citations omitted). The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.” U.S. CONST. amend. VI. The Supreme Court has long recognized that a defendant’s right to assistance of counsel is “important precisely because ordinarily a defendant is ill-equipped to understand and deal with the trial process without a lawyer’s guidance.” *Geders v. United States*, 425 U.S. 80, 88 (1976). Thus, the Supreme Court has interpreted the right to assistance of counsel “to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary factfinding process that has been constitutionalized in the Sixth and Fourteenth Amendments.” *Herring v. New York*, 422 U.S. 853, 857–58 (1975).

Claims that a defendant’s Sixth Amendment right to assistance of counsel were violated by a trial court order restricting communication between the defendant and his attorney are governed by two seminal Supreme Court cases, *Geders v. United States*, 425 U.S. 80 (1976), and *Perry v. Leeke*, 488 U.S. 272 (1989). In *Geders*, the Supreme Court held that “an order preventing petitioner from consulting his counsel ‘about anything’ during a 17-hour overnight recess between his direct-and cross-examination impinged upon his right to the assistance of counsel guaranteed by the Sixth Amendment.” *Geders*, 425 U.S. at 91. The Court reasoned that a trial court’s “broad power” in limiting witnesses’ communications before, during, and after their testimony in order to lessen the possibility of witness tampering is curtailed when the witness is the defendant because “[a] sequestration order affects a defendant in quite a different way from the way it affects a nonparty witness who presumably has no stake in the outcome of the trial.”

Id. at 87–88. The Court explained that an overnight recess is often a crucial time for both the defendant and his counsel:

It is common practice during such recesses for an accused and counsel to discuss the events of the day’s trial. Such recesses are often times of intensive work, with tactical decisions to be made and strategies to be reviewed. The lawyer may need to obtain from his client information made relevant by the day’s testimony, or he may need to pursue inquiry along lines not fully explored earlier. At the very least, the overnight recess during trial gives the defendant a chance to discuss the significance of the day’s events.

Id. at 88. The Court noted that a trial court could employ other means to guard against improper witness influence, such as allowing the examination to conclude. The Court concluded:

To the extent that conflict remains between the defendant’s right to consult with his attorney during a long overnight recess in the trial, and the prosecutor’s desire to cross-examine the defendant without the intervention of counsel, with the risk of improper “coaching,” the conflict must, under the Sixth Amendment, be resolved in favor of the right to the assistance and guidance of counsel.

Id. at 91 (citing *Brooks v. Tennessee*, 406 U.S. 605 (1972)).

Thirteen years later, the Supreme Court explained its *Geders* precedent and further defined the contours of a defendant’s Sixth Amendment right to assistance of counsel in *Perry v. Leeke*, 488 U.S. 272 (1989). In *Perry*, the Court held that an order barring a defendant from consulting with his attorney during a 15-minute afternoon break did *not* violate the defendant’s Sixth Amendment right to assistance of counsel. *Id.* at 284–85. While the Court acknowledged that “the line between the facts of *Geders* and the facts of [*Perry*] is a thin one,” the Court explained,

The interruption in *Geders* was of a different character because the normal consultation between attorney and client that occurs during an overnight recess would encompass matters that go beyond the content of the defendant’s own testimony—matters that the defendant does have a constitutional right to discuss with his lawyer, such as the availability of other witnesses, trial tactics, or even the possibility of negotiating a plea bargain. It is the defendant’s right to unrestricted access to his lawyer for advice on a variety of trial-related matters that is controlling

in the context of a long recess. The fact that such discussions will *inevitably include some consideration of the defendant's ongoing testimony* does not compromise that basic right. But in a short recess in which it is appropriate to presume that nothing but the testimony will be discussed, the testifying defendant does not have a constitutional right to advice.

Id. at 284 (emphasis added) (citation omitted).

Sixth Amendment Discussion

Villarreal's trial commenced on June 19, 2018, when the State began its case-in-chief. On the third day of trial, the State offered three witnesses before resting. Defense counsel moved for a directed verdict, which the trial court denied.

Defense counsel then began the presentation of defendant's case-in-chief, and Villarreal took the stand to testify in his own defense. Villarreal's testimony consisted of his relationship with Estrada and the events leading up to Estrada's murder, including the verbal and physical altercation between Villarreal and Estrada that allegedly precipitated the murder. As Villarreal was testifying to his actions immediately following the stabbing of Estrada, the trial court called a recess at 1:00 p.m. The recess would last until the following day at 1:00 p.m., at which time Villarreal's direct examination would continue. The majority's opinion considers the exchange between the trial court and Villarreal's counsel and interprets the instruction to counsel as a permissible exercise of "discretion to limit Villarreal's right to confer with his attorneys during an overnight recess to topics other than his ongoing testimony." The majority essentially agrees with the State's argument that the trial court's order struck a proper balance between the two competing concerns emphasized in both *Geders* and *Perry*: preserving the integrity of the defendant's

testimony and protecting the defendant's Sixth Amendment right to assistance of counsel.

Respectfully, this view lacks an objective perspective of the state of the case and the instruction's effect upon counsel and the accused.

As the record reflects, the trial court repeatedly ordered defense counsel to treat Villarreal as if he was still on the witness stand during the overnight recess. Defense counsel was not to discuss "what you couldn't discuss with him if he was on the stand in front of the [j]ury" and "to decide, if he asks you any questions . . . , [ask yourself] is this something that is going to be considered to be conferring with him on the witness stand while the jury is there or not." As the majority emphasizes, a defendant has no constitutional right to consult with his lawyer while he is testifying. As instructed, Villarreal's defense counsel were to treat Villarreal as if he was still on the witness stand in front of the jury, thus unable to consult with him at all during the overnight recess. When asked to confirm that counsel could not confer with their client, the trial court, supposing they may reach the sentencing phase the next day, permitted Villarreal's counsel to discuss "possible sentencing issues" with him during the overnight recess but immediately repeated his instruction, "I don't want you discussing what you couldn't discuss with him if he was on the stand in front of the jury." Understanding the trial court's instruction as a muzzle, counsel properly urged an objection under the Sixth Amendment. Considering the trial court's order in its entirety, Villarreal was deprived of counsel who could consult with him "about anything" or, at a minimum, about trial matters coming before the sentencing phase that did not concern "sentencing issues." *Geders*, 425 U.S. at 91 ("holding an order preventing [appellant] from consulting [with] his counsel 'about anything' during a [24]-hour overnight recess" is unconstitutional and "impinge[s] upon [the appellant's] right to the assistance of counsel guaranteed by the Sixth Amendment").

This division, however, is impermissible during a 24-hour overnight recess, as *Perry* and *Geders* explained. *See id.* at 284. Here, where the witness is the defendant testifying *after* the State has rested and the 24-hour overnight recess is the last before the defense rests, the majority acknowledges but ignores what the Supreme Court in *Perry* recognized—an overnight recess is an “interruption . . . of a different character” and, thus, a defendant has a constitutionally protected right to discuss a “variety of trial-related matters” during an overnight recess that “will *inevitably* include some consideration of the defendant’s ongoing testimony.” *Id.* at 281, 284 (emphasis added). “It is the defendant’s right to *unrestricted access* to his lawyer for advice on a variety of trial-related matters that is *controlling in the context of a long recess*,” regardless of “the fact that such discussions will *inevitably include some consideration of the defendant’s ongoing testimony*.” *See id.* at 284 (emphasis added). *Perry*’s reasoning was buttressed in *Geders* by specific examples of appropriate subjects of discussion that touch upon a defendant’s testimony, including “obtain[ing] . . . information made relevant by the day’s testimony,” such as the names and availability of other witnesses who may be able to corroborate the defendant’s testimony or discussing the possibility of negotiating a plea bargain after a defendant’s potentially damaging testimony. *Geders*, 425 U.S. at 88; *see Perry*, 488 U.S. at 284. Consultation between a defense attorney and his client “cannot be neatly divided into discussions about ‘testimony’ and those about ‘other’ matters.” *Mudd v. United States*, 798 F.2d 1509, 1512 (D.C. Cir. 1986). Unguided, the majority interprets the trial court’s instructions as an attempt “to thread the needle” that permissibly left Villarreal free to consult with his attorneys on any matter not related to his ongoing testimony.

Here, the overnight recess occurred after the State had rested and during Villarreal’s direct- examination while Villarreal was testifying to the alleged altercation that precipitated the

stabbing of the victim. Discussions between Villarreal and his counsel, as *Perry* recognized, would thus inevitably include “some consideration of” Villarreal’s testimony, particularly since the entirety of the defense’s case-in-chief rested solely on Villarreal’s testimony of self-defense. *See Perry*, 488 U.S. at 284. This is supported by the fact that on the day following the overnight recess, Villarreal’s testimony on direct concerned the defensive wounds Villarreal had allegedly received from the altercation that led to the stabbing of the victim. Thus, the trial court’s order prevented Villarreal from conferring with counsel about defensive matters that were “inextricably intertwined” with his previous testimony on direct. *See United States v. Triumph Capital Grp., Inc.*, 487 F.3d 124, 133 (2d Cir. 2007) (“[A] defendant’s constitutional right to consult with his attorney on a variety of trial-related issues during a long break, such as an overnight recess, is inextricably intertwined with the ability to discuss his ongoing testimony”). Because Villarreal’s entire defensive theory hinged on his testimony, Villarreal “may have needed advice on demeanor or speaking style, a task made more difficult if specific testimony could not be mentioned.” *See Mudd*, 798 F.2d at 1512; *see also United States v. Santos*, 201 F.3d 953, 965 (7th Cir. 2000) (holding that prohibiting the defendant from discussing his ongoing testimony with his attorney during a substantial recess “would as a practical matter preclude the assistance of counsel across a range of legitimate legal and tactical questions”).

Further, the trial court’s order was not just a simple instruction prohibiting Villarreal from discussing his testimony with his attorney; rather, it was an ambiguous order where Villarreal’s defense counsel, prior to advising Villarreal on his defensive strategy, was left to question whether the matter to be discussed was “something that is going to be considered to be conferring with [Villarreal] on the witness stand while the jury is there or not.” *Cf. Commonwealth v. Werner*, 214 A.2d 276, 278 (Pa. Super. Ct. 1965) (“It is not the function of the

trial judge to decide what a defendant's defense should be, nor when or how that defense should be planned, nor how much consultation between a defendant and his retained counsel is necessary to adequately cope with changing trial situations. That is the function of counsel."'). Even if Villarreal's defense counsel understood the trial court's order as an attempt to sever discussions between Villarreal's testimony and other permissible vaguely-defined matters, such as "possible sentencing issues," "an order such as [this] one . . . can have a chilling effect on cautious attorneys, who might avoid giving advice on non-testimonial matters for fear of violating the court's directive," particularly in light of the trial court's cautionary statement to Villarreal's counsel that "lawyers are under different rules than the defendants are." *See Mudd*, 798 F.2d at 1512. Defense counsel may have avoided further developing and exploring Villarreal's theory of self-defense with him during the overnight recess out of fear of violating the trial court's order were they to inevitably broach Villarreal's ongoing testimony. *See Geders*, 425 U.S. at 88. The trial court's order may have had a similar "chilling effect" in preventing defense counsel from discussing with Villarreal the "possibility of negotiating a plea bargain" if they had been dissatisfied with Villarreal's testimony on direct. *See Perry*, 488 U.S. at 284; *Mudd*, 798 F.2d at 1512. Further, defense counsel may have cautiously avoided reevaluating trial tactics and strategies with Villarreal because it would require some consideration of Villarreal's ongoing testimony. *See Perry*, 488 U.S. at 284; *United States v. Cobb*, 905 F.2d 784, 792 (4th Cir. 1990) ("To remove from [the defendant] the ability to discuss with his attorney any aspect of his ongoing testimony effectively eviscerate[s] his ability to discuss and plan trial strategy. To hold otherwise would defy reason. How can competent counsel not take into consideration the testimony of his client in deciding how to try the rest of the case?").

Notably, in this case, Villarreal’s testimony was interrupted on direct examination after the State had rested, and the trial court’s instructions were made *sua sponte*. Unlike in *Geders*, the government did not request an instruction pertaining to communications with the witness during the 24-hour long recess, and the prosecutor expressed no desire to cross-examine Villarreal without the intervention of counsel due to a risk of improper ‘coaching.’ The trial court was not asked to resolve any conflict between Villarreal’s right to counsel and the prosecutor’s desire to cross-examine an uninfluenced witness on cross-examination. *See Geders*, 425 U.S. at 82. The concerns expressed in both *Geders* and *Perry* are not present here; the instruction is thus even less justified than the order deemed impermissible in *Geders*. *See Geders*, 425 U.S. at 91 (holding the “prosecutor’s desire to cross-examine the defendant without the intervention of counsel” to prevent “the risk of improper ‘coaching’” must yield to the “defendant’s right to consult with his attorney during a long overnight recess in the trial”). Even assuming a perceived risk by the trial court, “the conflict must, under the Sixth Amendment, be resolved in favor of the right to the assistance and guidance of counsel.” *See Geders*, 425 U.S. at 91). This conclusion is consistent with decisions by all of the federal circuit courts that have considered the issue—the Second Circuit, the Ninth Circuit, the Seventh Circuit, the Fourth Circuit, and the District of Columbia Circuit. *See Triumph*, 487 F.3d at 132 (“[A]ll of the federal circuit courts that have considered the issue have concluded that under *Perry* and *Geders* a district court may not order a defendant to refrain from discussing his ongoing testimony with counsel during an overnight recess, even if all other communication is allowed.”); *United States v. Sandoval-Mendoza*, 472 F.3d 645, 651 (9th Cir. 2006); *Santos*, 201 F.3d at 965; *Cobb*, 905 F.2d at 792; *Mudd*, 798 F.2d at 1510.

For these reasons, I believe the trial court's order prohibiting Villarreal from conferring with his attorney during an overnight recess deprived him of his Sixth Amendment right to assistance of counsel.

Alternatively, Abuse of Discretion Review

Alternatively, I would also conclude that the trial court abused its discretion by prohibiting Villarreal from conferring with his attorney during the overnight recess, particularly where the trial court acts *sua sponte* and without the State indicating a desire to cross-examine an uninfluenced witness because of a perceived risk of 'coaching' by defense counsel. A trial court abuses its discretion by acting without reference to guiding rules and principles or by acting arbitrarily or unreasonably. *Burks v. State*, 227 S.W.3d 138, 145 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd) (citing *Lyles v. State*, 850 S.W.2d 497, 502 (Tex. Crim. App. 1993)). As the record reflects, the trial court did not merely prohibit Villarreal from discussing his testimony with his attorney, but repeatedly ordered defense counsel to treat Villarreal as if he was still on the witness stand during the overnight recess. Because a testifying defendant does not have a constitutional right to advice from counsel while on the stand, the trial court's instructions effectively divested Villarreal of his right to unrestricted consultation with counsel during the long overnight recess. The trial court essentially equated the long, overnight recess with a short, few-minute break. The trial court was thus acting without reference to the guiding constitutional principles set out in *Geders* and *Perry* by denying Villarreal of his "right to unrestricted access to his lawyer for advice" and abused its discretion by depriving Villarreal of his Sixth Amendment right to assistance of counsel during the overnight recess. *See Geders*, 425 U.S. at 91; *Perry*, 488 U.S. at 284.

Even assuming, as the majority does, that the trial court “tried to thread the needle” by prohibiting only communications concerning Villarreal’s ongoing testimony, the trial court did not have the discretion to impose even this tailored limitation on Villarreal and his counsel because their discussions during the 24-hour long overnight recess would “inevitably include some consideration of the defendant’s ongoing testimony.” *See Perry*, 488 U.S. at 284. While it is entirely “appropriate to presume that nothing but the testimony will be discussed” in a short recess, an overnight recess is “of a different character” and is not subject to the same presumption. *Id.* Instead, “[i]t is the defendant’s right to *unrestricted* access to his lawyer . . . that is controlling in the context of a long recess.” *Id.* (emphasis added). Because this was a recess spanning 24-hours, much longer than the 17-hour overnight recess in *Geders*, the trial court had no discretion to take away Villarreal’s right to “unrestricted access” to his lawyer even if such discussions would involve ongoing testimony, particularly where his own testimony amounts to his whole defense. *See id.*; *cf. Werner*, 214 A.2d at 278 (“The right to the assistance of . . . counsel is not a right which exists only from 9 a.m. to 4 p.m. and only in the courtroom and only concerning certain aspects of the case. The defendant had the right to discuss the entire case, including his own testimony, with his attorney. . . . Discussion of this testimony might have been very important in determining the future course of his defense.”).

For these reasons, I would also find, in the alternative, that the trial court acted without reference to the constitutional principles set out in *Geders* and *Perry*, and thus abused its discretion by prohibiting counsel to provide unrestricted counsel to Villarreal during the overnight recess.

Harm Discussion

Having found error under an abuse of discretion standard, I must next consider whether the error is “structural” and thus reversible without a showing of harm, or whether the error must be subjected to a harm analysis because it is not “structural.” *See Johnson v. State*, 169 S.W.3d 223, 235–36 (Tex. Crim. App. 2005). A structural error is a “defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.” *Johnson v. United States*, 520 U.S. 461, 468 (1997) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)). Structural errors “give rise to automatic reversal, with no harm analysis whatsoever.” *Johnson*, 169 S.W.3d at 232. We may “not review and analyze a claim of error as structural error unless the United States Supreme Court has defined the error as structural” *Burks*, 227 S.W.3d at 144 (citing *Gray v State*, 159 S.W.3d 95, 97 (Tex. Crim. App. 2005)).

In *Johnson v. United States*, the Supreme Court set forth its most recent list of structural errors: the total deprivation of counsel at trial, lack of an impartial trial judge, the unlawful exclusion of members of the defendant’s race from a grand jury, the denial of the right to self-representation at trial, the denial of the right to a public trial, and an instruction that erroneously lowers the burden of proof for conviction below the “beyond a reasonable doubt” standard. *Johnson*, 169 S.W.3d at 235 (quoting *Johnson*, 520 U.S. at 468–69).

“All structural errors must be founded on a violation of a federal constitutional right, but not all violations of federal constitutional rights amount to structural errors.” *Schmutz v. State*, 440 S.W.3d 29, 35 (Tex. Crim. App. 2014). In fact, “[m]ost constitutional errors are not ‘structural.’” *Mendez v. State*, 138 S.W.3d 334, 340 (Tex. Crim. App. 2004). “For federal constitutional error that is not structural, the applicable harm analysis requires the appellate court to reverse unless it determines beyond a reasonable doubt that the error did not contribute to the

defendant's conviction or punishment." *Lake v. State*, 532 S.W.3d 408, 411 (Tex. Crim. App. 2017) (citing TEX. R. APP. P. 44.2(a)).

Here, the State contends that Villarreal did not suffer structural error, that is, he did not suffer a total deprivation of counsel, and thus a harm analysis is required. I disagree. The Supreme Court likened a *Geders* violation to the "actual or constructive denial of the assistance of counsel *altogether*" and:

simply reversed the defendant's conviction without pausing to consider the extent of the actual prejudice, if any, that resulted from the defendant's denial of access to his lawyer during the overnight recess. That reversal was consistent with the view we have often expressed concerning the fundamental importance of the criminal defendant's constitutional right to be represented by counsel.

Perry, 488 U.S. at 279–80 (emphasis added) (citation omitted). Moreover, in *United States v. Cronin*, 466 U.S. 648 (1984), the Supreme Court cited *Geders* as an example of where it had "found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *Id.* at 659 n.25; *see also Johnson*, 169 S.W.3d at 231 (likening the "denial of counsel at a critical stage" to "the deprivation of a trial and the deprivation of an appeal" and reasoning both errors "would clearly be reversible without a showing of harm").

Additionally, having already found that Villarreal was denied his Sixth Amendment right to assistance of counsel, "it would be anomalous if defendant was also forced to relinquish the right to have his discussions with his lawyer kept confidential" because "[t]he only way that a defendant could show prejudice [in this context] would be to present evidence of what he and counsel discussed, what they were prevented from discussing, and how the order altered the

preparation of his defense” and would thus improperly infringe upon the defendant’s attorney-client privilege. *See Mudd*, 798 F.2d at 1513.

Here, the trial court’s order, much like the order in *Geders*, prevented Villarreal from consulting with his lawyer during a 24-hour overnight recess. As the Supreme Court held in *Geders*, an order that prohibits the appellant from consulting with his counsel during a 24-hour overnight recess is unconstitutional and “impinge[s] upon [the appellant’s] right to the assistance of counsel guaranteed by the Sixth Amendment.” *See Geders*, 425 U.S. at 91. Moreover, the trial court’s order effectively denied Villarreal the constitutional right to discuss trial-related matters with his attorney and it prohibited Villarreal and his counsel from further developing Villarreal’s defense during the overnight recess; thus, Villarreal was denied the “guiding hand of counsel at every step in the proceedings against him.” *See id.* at 88–89 (quoting *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932)). Because the trial court’s order, like the order held impermissible in *Geders*, constructively denied Villarreal “assistance of counsel altogether,” the error is “structural” and thus reversible without a showing of harm or prejudice. *See Perry*, 488 U.S. at 280.

Alternatively, if the trial court’s error were subjected to a harm analysis, I cannot say “beyond a reasonable doubt that the error did not contribute to the conviction or punishment.” *See TEX. R. APP. P. 44.2(a)*. Thus, in the alternative, reversal is also required under Rule 44.2(a). Under Texas Rule of Appellate Procedure 44.2(a), a non-structural federal constitutional error must be reversed “unless the court determines beyond a reasonable doubt that the error did not contribute to [Villarreal’s] conviction or punishment.” *Id.* Under this standard, the State has the burden to prove the error is harmless beyond a reasonable doubt. *Davis v. State*, 195 S.W.3d 311,

316–17 (Tex. App.—Houston [14th Dist.] 2006, no pet.); *see Chapman v. California*, 386 U.S. 18, 26 (1967) (finding, under the “harmless-constitutional-error” test, that the State did not demonstrate to the Court, beyond a reasonable doubt, that the error did not contribute to petitioner’s conviction). “Unless the error could not possibly have contributed to the conviction or punishment, we must reverse.” *Davis*, 195 S.W.3d at 316–17 (citing *Wall*, 184 S.W.3d at 746). A reviewing court may consider “the source and nature of the error, the extent to which the State emphasized it, its probable collateral implications, [and] the weight the jury would probably give it,” though these factors are neither exhaustive or dispositive. *Id.* (citing *Harris v. State*, 790 S.W.2d 568, 587 (Tex. Crim. App. 1989)). “If, after such analysis, the harm of the error simply cannot be assessed, then ‘the error will not be proven harmless beyond a reasonable doubt,’ and reversal is required.” *Morris v State*, 554 S.W.3d 98, 124 (Tex. App.—El Paso 2018, pet. ref’d) (quoting *Lake*, 532 S.W.3d at 411).

Here, the State argues “if depriving a defendant of his ability to discuss his testimony with counsel during a short break is not even error . . . , then it is hard to see how the restriction is not ‘obviously’ harmless under the circumstances.” However, an overnight recess is of an entirely “different character” and while it is “appropriate to presume that nothing but the testimony will be discussed” in a short recess, in the context of a long recess, “[i]t is the defendant’s right to unrestricted access to his lawyer for advice . . . that is controlling,” even if “such discussions will inevitably include some consideration of the defendant’s ongoing testimony.” *See Perry*, 488 U.S. at 284. Moreover, “[t]he only way that a defendant could show prejudice [in this context] would be to present evidence of what he and counsel discussed, what they were prevented from discussing, and how the order altered the preparation of his defense,” which are private discussions reasonably protected by the attorney-client privilege. *See Mudd*,

798 F.2d at 1513. Further, given the ambiguous nature of the trial court's order to Villarreal, we cannot say beyond a reasonable doubt that Villarreal understood he could still, in fact, communicate with his attorneys, nor can we determine whether Villarreal refrained from consulting with his attorneys for fear of violating the trial court's order. *Cf. Geders*, 425 U.S. at 88–89 (“The right to be heard would be, in many cases, of little avail if [the defendant] did not comprehend the right to be heard by counsel. . . . [A defendant] is unfamiliar with the rules of evidence. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he [may] have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.” (quoting *Powell*, 287 U.S. at 68–69)). Certainly, counsel expressed such a concern. Accordingly, I would conclude, in the alternative, that if the trial court's error

were subjected to a harm analysis, I cannot say beyond a reasonable doubt that the error did not contribute to the conviction or punishment.

2For example, the trial court first directed its order to Villarreal: “And so I’d like to tell you [Villarreal] that you

Dissenting Opinion 04-18-00484-CR

For the reasons stated above, I respectfully dissent.

Rebeca C. Martinez, Justice

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